

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board)	CC Docket No. 96-45
on Universal Service)	
)	
TRACFONE WIRELESS, INC.)	
)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
In the State of New York)	

**CONSOLIDATED COMMENTS OF
TDS TELECOMMUNICATIONS CORP.
ON
TRACFONE WIRELESS PETITIONS FOR
FORBEARANCE AND ETC DESIGNATION**

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SUMMARY

On June 8, 2004, the Commission issued a Notice of Proposed Rulemaking (Notice) seeking comment on the Recommended Decision of the Federal-State Joint Board on Universal Service (Joint Board) released on February 27, 2004 (Recommended Decision). Among other issues, the Notice sought comment on a number of proposals concerning the criteria and procedures for designating eligible telecommunications carriers (ETCs) entitled to receive support from the universal service fund. In essence, the Joint Board proposal recommends that the Commission impose *additional* minimum eligibility requirements on carriers seeking ETC designation, with the goal of improving the long-term sustainability of the universal service fund by ensuring that only fully qualified carriers who are capable of and committed to providing universal service in accordance with the Commission's rules are able to receive support from the fund.

Against this backdrop of Commission efforts to control the growth of the universal service fund, on the very day the Commission issued the Notice, TracFone Wireless, Inc. (TracFone) filed the instant petitions for ETC designation and forbearance. The Petitions ask the Commission to forbear from the long-standing requirement that ETCs provide supported services using their own facilities or a combination of their own facilities and resold service in order to grant ETC status to a pure reseller of prepaid wireless services. The TracFone Petitions fall far short of demonstrating that the public interest would be served by significantly *expanding* the class of carriers eligible for ETC designation to encompass pure wireless resellers. Indeed, even if the Commission were to forbear from applying the facilities requirement to wireless resellers, TracFone still could not meet the requirements for ETC designation.

Specifically, the Commission should reject the TracFone Petitions because:

- TracFone has not shown that the Commission’s concerns about “double recovery” of universal service support by pure resellers necessarily are inapplicable to resellers of wireless services;
- The prepaid service for which TracFone seeks support does not meet the universal service eligibility requirements because it does not provide consumers with a persistent, basic connection to the public switched telephone network (including emergency services);
- There is no indication that designating TracFone as an ETC will result in either increased competitive choices or improved mobile services in rural, high-cost areas; and
- Eliminating the foundational requirement that ETCs offer service using at least some of their own facilities will have a significant overall impact on the universal service fund, the scope of which is unpredictable at this time.

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TDS Telecommunications Corp. (TDS Telecom), parent company of rural local exchange carriers (RLECs) Deposit Telephone Company, Edwards Telephone Company, Oriskany Falls Telephone Company, Port Byron Telephone Company, Township Telephone Company, and Vernon Telephone Company (collectively, the TDS RLECs), submits these comments in opposition to the Petitions of TracFone Wireless, Inc. (TracFone), a pure reseller of prepaid commercial mobile radio services (CMRS), for Designation as an Eligible Telecommunications Carrier in the State of New York (ETC Petition)¹ and for Forbearance from the requirement that eligible telecommunications carriers (ETCs) provide supported services using their own facilities or a combination of their own facilities and another carrier's services

¹ Petition, *Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of New York*, CC Docket No. 96-45 (filed June 8, 2004, Public Notice rel. June 24, 2004) (ETC Petition).

(Forbearance Petition and, together with the ETC Petition, the Petitions).² The Commission currently is exploring appropriate mechanisms for controlling the growth of the universal service fund, including by imposing additional minimum eligibility requirements on carriers seeking ETC designation. Against the backdrop of this rulemaking proceeding, the Petitions fail to demonstrate that the statutory requirements would be met or the public interest would be served by significantly *expanding* the class of telecommunications carriers eligible to draw from the universal service fund by designating a pure reseller of prepaid wireless services as an ETC.

I. THE FORBEARANCE PETITION FAILS TO DEMONSTRATE THAT THE PUBLIC INTEREST WOULD BE SERVED BY ALLOWING PURE WIRELESS RESELLERS TO DRAW SUPPORT FROM THE UNIVERSAL SERVICE FUND

TracFone's Forbearance Petition asks the Commission to expand dramatically the class of telecommunications service providers eligible for universal service funding. TracFone makes this request at the same time that both the Commission and the Federal-State Joint Board on Universal Service (Joint Board) have recognized the need to limit the size of the universal service fund and are exploring mechanisms to control the growth of the fund. Ignoring the parallel rulemaking proceeding, the Forbearance Petition fails to address at all the overall impact of the requested forbearance on the size of the universal service fund. In this and other respects, the Forbearance Petition falls far short of making the kind of showing that would justify eliminating a foundational statutory requirement for receiving universal service support.

Section 214(e)(1)(A) of the Communications Act of 1934, as amended, (Act) requires eligible telecommunications carriers to provide supported services using either their

² Petition for Forbearance, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed June 8, 2004, Public Notice rel. June 24, 2004) (Forbearance Petition).

own facilities or a combination of their own facilities and resold services.³ TracFone admits that, as a pure reseller of wireless services, it does not and cannot satisfy this requirement. TracFone thus asks the Commission to forbear from applying this requirement to the ETC Petition under Section 10 of the Act.

Section 10 requires the Commission to forbear from applying any provision of the Act to a carrier if the Commission finds that (1) enforcement of the provision is not necessary to ensure that charges, practices, classifications, or regulations by, for, or in connection with the carrier are just and reasonable and not unjustly discriminatory; (2) enforcement of the provision is not necessary to protect consumers; and (3) forbearance from applying the provision is consistent with the public interest.⁴ Competitive local exchange resellers initially sought Section 10 forbearance from the facilities requirement in the Commission's 1996-97 proceeding to develop rules for the universal service program.⁵ Without reaching the first two elements of the test, the Commission determined that the public interest would not be served by granting the requested forbearance because it would allow resellers to realize a "double recovery" from the universal service fund. That is, pure resellers would recover universal service support on their own behalf while simultaneously paying wholesale prices that already reflected the universal service support recovered by the resellers' underlying facilities-based carriers. The Commission concluded that this result would favor resellers over other carriers, would not be competitively neutral, and would send inefficient economic signals to resellers.⁶

³ 47 U.S.C. § 214(e)(1)(A).

⁴ 47 U.S.C. § 160(a)(1)-(3).

⁵ Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776, 8875 (1997) (*Universal Service Report & Order*).

⁶ *Id.* at 8875-76.

TracFone contends that the rationale underlying the Commission's 1997 decision to reject the wireline resellers' forbearance request does not apply to pure wireless resellers because the underlying facilities-based wireless carriers do not receive universal service support and the wholesale rates paid by wireless resellers therefore do not reflect universal service support but are based on arms-length negotiation and market demand for the resold services.⁷ TracFone further argues that the remaining elements of the forbearance test are satisfied with respect to pure wireless resellers because (1) competition among CMRS providers will ensure that TracFone's rates are just and reasonable and eligibility for universal service support will further enable CMRS resellers to offer affordable, competitive rates in high-cost areas⁸; (2) allowing wireless resellers to receive universal service funding will not harm consumers because "consumers who currently receive universal service-supported services will continue to receive the same universal service benefits" as well as having the additional option of receiving USF-supported prepaid wireless services⁹; and (3) granting the requested forbearance will serve the public interest by "allowing TracFone to charge competitive rates to consumers located in high-cost, rural and insular areas and by providing consumers, including low income consumers eligible for Lifeline service, with more options for services supported by the Universal Service Fund."¹⁰ TracFone's analysis suffers from both factual inaccuracies and a failure to consider fully all the factors affecting the public interest determination.

The Forbearance Petition ignores two significant factors affecting whether forbearance from the facilities requirement is justified under Section 10. First, the Forbearance

⁷ Forbearance Petition at 9-10.

⁸ *Id.* at 5-6.

⁹ *Id.* at 7-8.

¹⁰ *Id.* at 10.

Petition ignores the broad overall impact of the forbearance request on the universal service fund. Second, the Forbearance Petition refuses to acknowledge the significance of the fact that facilities-based CMRS providers increasingly are receiving universal service support for the wireless services they provide in rural areas.

On the very day the Forbearance Petition was filed, the Commission issued a Notice of Proposed Rulemaking seeking comment on a Recommended Decision of the Joint Board, released some three months earlier, proposing changes in the ETC designation process.¹¹ It is clear from the Notice, the Recommended Decision, and the Referral Order triggering the Recommended Decision that the proposed changes are driven by the need to control the payments flowing out of the universal service fund to ensure its long-term sustainability.¹² Toward that end, the Recommended Decision proposes applying *additional* minimum eligibility requirements (not eliminating existing requirements) to applicants for ETC designation to ensure that the ETC designation process is “rigorous” and limits the payment of universal service support to “only fully qualified carriers that are capable of, and committed to, providing universal service.”¹³

¹¹ Notice of Proposed Rulemaking, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 04-127 (rel. June 8, 2004) (Notice) (seeking comment on Recommended Decision, *Federal-State Joint Board on Universal Service Seeks Comment on Certain of The Commission's Rules Relating to High-Cost Universal Support and The ETC Designation Process*, CC Docket No. 96-45, FCC 04J-1 (rel. Feb. 27, 2004) (Recommended Decision)).

¹² See, e.g., Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 02-307, at ¶ 5 (“The Commission indicated [in the *Rural Task Force Order*] that excessive growth in the fund is possible . . . ‘if incumbent carriers lose many lines to competitive eligible telecommunications carriers, or if competitive eligible telecommunications carriers add a significant number of lines.’”), ¶ 8 (“[T]he Joint Board should address the specific concerns raised in the *Rural Task Force Order* regarding excessive growth in the fund if incumbent rural carriers lose a significant number of lines to competitive ETCs.”) (rel. Nov. 8, 2002) (Referral Order); Recommended Decision ¶ 1 (“Overall, we believe that our recommendations will preserve and advance universal service, maintain competitive neutrality, and ensure long-term sustainability of the universal service fund.”); Notice ¶ 1 (“We seek comment on whether the Joint Board’s recommendations should be adopted, in whole or in part, in order to preserve and advance universal service, maintain competitive neutrality, and ensure long-term sustainability of the universal service fund.”).

¹³ Recommended Decision ¶ 9.

The Forbearance Petition ignores the existence of these proceedings and the concerns expressed therein about the growth of the universal service fund. But these factors do affect the determination of whether the Forbearance Petition meets the Section 10 test. For example, TracFone contends that the requirement that competitive ETCs (CETCs) offer service using at least some of their own facilities is not necessary to ensure that TracFone's service charges are just and reasonable. However, limiting the extent to which CETCs are eligible for universal service payments may be necessary to ensure that *all* consumers' telecommunications service charges (including their contributions to the universal service fund) remain just and reasonable.

Controlling the growth of the universal service fund is also necessary to protect consumers. TracFone asserts that the second prong of the forbearance test is satisfied because "[c]onsumers are guaranteed that they will receive all the benefits of the universal service programs" as additional CETCs are designated to receive universal service support – even if the Universal Service Administrative Company (USAC) has to borrow funds commercially to pay the required support.¹⁴ But the universal service fund is not a bottomless well, and it is clear from the pending rulemaking proceedings that the Commission will consider taking steps to curtail the scope of support if demands on the fund become excessive.¹⁵ To protect rural consumers from reductions in the universal service support they receive, the Commission must refrain from eliminating a foundational eligibility requirement for ETC designation.

Finally, the concerns raised in the pending rulemaking proceeding also affect the broader determination of whether the public interest would be served by granting the requested

¹⁴ Forbearance Petition at 7.

¹⁵ See, e.g., Recommended Decision ¶¶ 56-80 (recommending limiting universal support to a "single connection" per subscriber).

forbearance. The Recommended Decision and other recent Commission decisions reflect a clear sense that the public interest requires the Commission to limit the payment of universal service support to carriers who have demonstrated a genuine commitment (including through the construction of facilities) to serving rural, high-cost areas. Conversely, the public interest would not be served by forbearing from applying this key eligibility requirement for ETC designation as TracFone requests.

Concerns about unsustainable growth of the universal service fund also highlight the continuing importance of ensuring that ETCs do not realize a “double recovery” of universal service support. In that regard, TracFone again ignores the current reality in arguing that such “double recovery” concerns are not implicated by its forbearance request. TracFone insists that it will not recover double universal service support because “[m]ost of TracFone’s vendors are not ETCs and do not receive support from the Universal Service Fund and the rates charged by those vendors to TracFone are not subsidized by Universal Service support.”¹⁶ Yet TracFone itself acknowledges that CMRS providers that utilize their own facilities are eligible to receive universal service support.¹⁷ Among the underlying facilities-based providers TracFone uses in New York, at least AT&T Wireless and Rural Cellular Corporation have already sought ETC designation in some U.S. markets, even if not yet in New York. Moreover, although facilities-based CMRS carriers may not be *obligated* to pass through universal service support to wholesale resellers like TracFone, any universal service support they receive certainly affects the wholesale rates they are able to charge resellers. Thus, the risk that a pure reseller awarded universal service support would realize a “double recovery” of support remains a real possibility

¹⁶ Forbearance Petition at 9.

¹⁷ *Id.* at 6.

in the wireless context. Accordingly, the Commission's determination that the public interest would not be served by making universal service support available to pure resellers like TracFone remains valid.

II. TRACFONE DOES NOT MEET THE STATUTORY REQUIREMENTS FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER

Along with the Forbearance Petition, TracFone filed the ETC Petition seeking designation as a competitive eligible telecommunications carrier throughout rural and non-rural service areas in New York. As noted above, Section 214(a)(1) of the Act provides that any carrier seeking designation as an ETC must provide all the supported services throughout the requested service area using its own facilities or a combination of its own facilities and resold services.¹⁸ As described in Part I, TracFone has not met the requirements necessary to justify forbearance from the facilities-based requirement in connection with the ETC Petition. Accordingly, TracFone does not meet the statutory requirements for ETC designation and the ETC Petition should be denied on that ground.

Even if the Commission were to grant the Forbearance Petition, it should still reject the ETC Petition. TracFone still would not satisfy the eligibility requirements for designation as an ETC. Nor would the public interest be served by designating a pure reseller of prepaid wireless services as a CETC in rural service areas throughout the State of New York.

A. TracFone Does Not Provide All Of The Required Supported Services

To be eligible for ETC designation, a petitioner first must demonstrate that it offers all the supported services throughout the designated service areas. The supported services are: (1) voice grade access to the public switched telephone network; (2) local usage; (3) dual

¹⁸ 47 U.S.C. § 214(a)(1)(A).

tone multi-frequency signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to 911 and E911 emergency service; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualified low-income customers.¹⁹ Setting aside the obligation to provide these services using at least some of the petitioner's own facilities, TracFone has not demonstrated that it will provide all of these services.

With respect to E911 service, TracFone states only that it will implement E911 service "when such services are made available by the carriers from whom TracFone purchases service."²⁰ Thus, TracFone's ability to provide required services is dependent on decisions made by other carriers. If those carriers have not deployed E911 as required to receive universal service support (and TracFone asserts that most of its underlying vendors have not been granted ETC designation), then TracFone also is not entitled to receive support. It is not enough for TracFone to state that it will provide supported service to the extent they are made available by underlying carriers who are not themselves ETCs and have not demonstrated that they provide the required services.

TracFone also admits that it does not provide toll limitation to its customers, but insists that there is "no need" to do so because of the prepaid nature of TracFone's wireless service.²¹ Toll limitation refers to a service that allows a consumer to block or limit the completion of outgoing toll calls from the consumer's number.²² The purpose of the service is to allow low-income customers in particular to limit their expenditures for toll calls so that

¹⁹ See 47 C.F.R. § 54.101(a).

²⁰ ETC Petition at 6.

²¹ *Id.* at 7.

²² 47 C.F.R. § 54.400(b)-(d).

“lifeline” local services (including access to emergency services) are not terminated because of high unpaid toll charges.²³ TracFone asserts that because its customers must pay for service in advance, there is no possibility that they will be “disconnected” for failure to pay heavy toll charges and thus no need (and no way) for TracFone to allow its customers to limit their use of toll services.²⁴ TracFone claims that its customers have sufficient ability “to control or limit their charges for toll service (as well as local service)” by limiting the amount they prepay for service.²⁵

TracFone’s argument fails to recognize – and its service fails to achieve – the goal of providing supported, toll-limited service to low income customers. When a low income customer obtains toll-limited Lifeline service from a wireline local service provider, the customer is able to control the expenditure of limited resources and ensure basic connectivity to critical public safety and other local communications services. By contrast, the default state for TracFone’s prepaid customers is not one of basic connectivity to local communications services. Instead, as TracFone fully acknowledges, customers “can only use what [services] they have paid for.”²⁶ Thus, customers are in a persistent state of “disconnection” until they provide some payment to TracFone for service. If the customer uses up the service it has paid for, it loses access to *any* service until additional funds are paid. Moreover, because “TracFone treats long

²³ See Fourth Order on Reconsideration, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 13 FCC Rcd 5318, 5388-89 (1997) (“[W]e believe that requiring carriers to provide at least one type of toll-limitation service is sufficient to provide low-income consumers a means by which to control their toll usage *and thereby maintain their ability to stay connected to the public switched telephone network.*”) (emphasis added).

²⁴ See ETC Petition at 7-8 (“TracFone treats long distance minutes as any other minutes and the customers are not charged separately for toll services. Inasmuch as TracFone’s services are prepaid there is no danger that low income customers will incur large charges for heavy toll (or other) calling and no risk that they will be disconnected for nonpayment.”).

²⁵ *Id.* at 8.

²⁶ *Id.*

distance minutes as any other minutes,”²⁷ there is no way for TracFone to allow its low-income customers to limit their usage of (what may be scarce) prepaid services to critical local communications.²⁸ This is the goal of the toll limitation requirement. Because TracFone cannot meet this requirement – and cannot give its customers the opportunity to ensure that toll usage does not interfere with access to local services (including emergency services) – it does not provide “universal service” and cannot be designated as an eligible telecommunications carrier.

Because TracFone has not demonstrated that it provides the basic services required to be designated as an ETC, the Commission should deny the ETC Petition in its entirety, with respect to both rural and non-rural service areas.

B. Designation Of TracFone As An Eligible Telecommunications Carrier Would Not Serve The Public Interest

In addition to failing to meet the basic eligibility criteria for ETC designation, TracFone has not demonstrated that its designation as an ETC in rural areas would serve the public interest. This provides additional support for rejecting the ETC Petition as it applies to rural service areas, including those served by the TDS RLECs.

Where a petitioner seeks ETC designation in an area served by a rural local exchange carrier, the petitioner must show that the public interest would be served by designating the petitioner as an additional ETC in the rural service area. In its recent *Virginia*

²⁷ *Id.* at 7.

²⁸ An example illustrates the problem. A low-income TracFone customer with \$10 per month to spend on telecommunications services must prepay TracFone the \$10 at the beginning of each month to have access to any service. In exchange for that payment, the customer receives the right to engage in a specified number of minutes worth of calling to or from the customer’s TracFone handset. There is no way for the customer to limit its use of those minutes to local communications. Accordingly, the customer could place *or receive* toll calls that use up the allotted minutes during the first two weeks of the month. At that point, the customer would lose access to *any* service until it makes a new \$10 payment (or perhaps, in the universal service context, receives a Lifeline credit) at the beginning of the next month. The customer would then be without access to basic local communications, including access to emergency services, because of excessive toll calling (which in the case of a wireless customer may not be entirely within the wireless customer’s control because of the “called party pays” nature of wireless service in the United States).

Cellular and *Highland Cellular* decisions, the Commission stated that, pending a decision on the ETC designation issues raised in the Recommended Decision, this public interest analysis will “weigh the benefits of increased competitive choice, the impact of the designation on the universal service fund, the unique advantages and disadvantages of the competitor’s service offering, any commitments made regarding quality of telephone service, and the competitive ETC’s ability to satisfy its obligation to serve the designated service areas within a reasonable time frame.”²⁹ Applying this standard as prescribed in *Virginia Cellular* and *Highland Cellular*, it is clear that the public interest would not be served by designating TracFone as an ETC in rural service areas throughout New York. The reasons are several.

First, there is no indication that granting TracFone ETC status will offer any “increased” competitive choice. The ETC Petition states that TracFone already provides affordable wireless service, at the same rates available to its other customers nationwide, throughout the rural service areas served by its underlying facilities-based CMRS suppliers.³⁰ Because as a reseller TracFone does not control the whereabouts of the facilities it uses to serve its customers, there is no indication that receiving universal service support will allow TracFone to extend the reach of its service to areas where competitive choices are not currently available.

²⁹ See Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 03-338, ¶ 28 (rel. Jan. 22, 2004) (*Virginia Cellular*); Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service, Highland Cellular, Inc Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, FCC 04-37, ¶ 22 (rel. Apr. 12, 2004) (*Highland Cellular*).

In commenting on other pending petitions for ETC designation, TDS Telecom has urged the Commission not to apply the *Virginia Cellular/Highland Cellular* “interim standard” to pending ETC petitions but to defer consideration of the pending petitions until the ETC designation issues raised in the Recommended Decision have been resolved in the rulemaking context. See, e.g., Comments of TDS Telecommunications on Petition of RCC Minnesota, Inc. and RCC Atlantic, Inc. for Designation as an Eligible Telecommunications Carrier in the State of New Hampshire, CC Docket No. 96-45, at 2-7 (June 21, 2004). We reiterate and incorporate those arguments herein. However, for the additional reasons set forth here, the TracFone Petitions can and should be denied without waiting for resolution of the ETC designation issues in the Recommended Decision.

³⁰ See, e.g., ETC Petition at 2.

Second, although TracFone contends that its prepaid wireless service offers the benefits of mobility and affordability, the “toll limitation” discussion above highlights a unique and fundamental *disadvantage* of TracFone’s service offering. TracFone’s prepaid service simply does not offer the basic connectivity to the local telephone network that is the foundation of universal service. The TracFone service is transient and cuts off whenever the customer expends the allotted minutes and is unable to prepay for additional service. This type of service may have a place in the market, but it is not the type of service that should be supported by limited universal service funds.

Third, TracFone does not and cannot make any commitment that it will use universal service support to improve the quality or expand the geographic reach of its services. TracFone insists that it already provides service everywhere its underlying providers’ networks reach, and it has no control over the upgrade or buildout plans of those underlying carriers. Indeed, because TracFone has limited information about its underlying carriers’ plans concerning the deployment of facilities, it cannot fully support its claim that it provides (or within a reasonable time will provide) service throughout the rural service areas in which it seeks ETC designation.

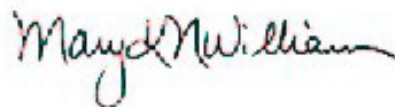
Finally, as TracFone admits in the Forbearance Petition, designating TracFone as an ETC will require eliminating the foundational requirement that ETCs provide service using their own facilities or a combination of their own facilities and resold services. This will have a substantial overall impact on the universal service fund, the full scope of which cannot be predicted at this time. For the reasons set forth in Part I above, the public interest would not be served by placing these new burdens on the universal service fund at this time.

CONCLUSION

TracFone has not met the statutory requirements for granting either the Forbearance Petition or the ETC Petition. Nor has TracFone demonstrated that the public interest would be served by granting the Petitions. Accordingly, TDS Telecom urges the Commission to reject both Petitions and dedicate its resources to resolving the ETC designation issues raised in the pending Recommended Decision.

Respectfully submitted,

TDS TELECOMMUNICATIONS CORP.

A handwritten signature in blue ink that reads "Mary Newcomer Williams". The signature is written in a cursive style with a large, stylized "M" and "W".

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